STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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October 4, 2004

Honorable Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals II
445 12th Street, SW
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

RE: Comments of the New York State Department of Public Service in the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338.

Dear Secretary Dortch:

Enclosed for filing please find the Comments of the New York State Department of Public Service in the above-referenced proceeding.

Should you have any questions on these Comments, please call me at (518) 474-2510.

Sincerely,

Dawn Jablonski Ryman

Dawn Jablonski Ryman
General Counsel

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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling	)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange	)	
Carriers	)	

COMMENTS OF THE NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE

Dated: October 4, 2004
Albany, New York

Table of Contents

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	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
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COMMENTS OF THE NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE

Introduction and Summary

The New York State Department of Public Service (NYDPS) submits these comments in response to the Federal Communications Commission's (Commission) Order and Notice of Proposed Rulemaking (NPRM) released August 20, 2004 and published in the September 13, 2004 *Federal Register*. The Commission ordered incumbent local exchange carriers (ILECs) to continue providing unbundled access to switching, enterprise market loops and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004.[1] In the accompanying NPRM, the Commission seeks comments on establishing unbundling rules under the Telecommunications Act of 1996 (the Act) §§ 251(c) and 251(d)(2) in a manner consistent with the *USTA II* decision.[2] In particular, it seeks comments on a legally sustainable impairment standard and the application of that standard to

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[1] *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of ILECs*, Order and NPRM (released August 20, 2004), FCC 04-179.

[2] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), *pets. for cert. filed*, Nos. 04-12, 04-15, 04-18 (June 30, 2004).

individual network elements. Comments also are sought on a proposed transition mechanism for both Unbundled Network Element Platform (UNE-P) and transport. Finally, the Commission seeks a summary of state data on switch and transport competition.

NYDPS supports the Commission's efforts to establish unbundling rules that promote and encourage facilities-based competition. As the economics and technology of competitive telecommunications markets are constantly changing, regulatory policies must remain flexible. No longer is telecommunications competition as critically reliant upon the use of the incumbents' network. Competitors with their own facilities are also using wireless, PacketCable,[3] and voice over internet protocols (VoIP) via digital subscriber lines (DSL) and cable modems[4] to provide alternatives to the traditional incumbent local landline network.

Hence, the Commission should analyze switching impairment by evaluating the presence of both intramodel and intermodal competition.[5] Toward that end, NYDPS has developed an impairment analysis to illustrate our preferred option that could be used as a model for national impairment criteria under 47 U.S.C. §251(d). Although we use the model to evaluate the New York market, the criteria developed could be used to make "impairment" or "non-impairment" determinations in any market.

The Order sets forth a six month interim regime to preserve the status quo. In the NPRM, the Commission proposes another six month transition and a one dollar UNE-P price increase if there is a finding of no impairment, or if the Commission fails to establish permanent rules. We support a price increase and a transition period; however, we support a higher initial price

[3] PacketCable services use the private managed IP backbone of the cable companies.

[4] These services rely on the cable and telephony companies to deliver voice telephony using combinations of self-provisioned equipment or facilities, common carrier services, and the public internet.

[5] Intermodal encompasses those unique and separate arrangements that provide the customer originating and terminating access at their premises via separate facilities (i.e., wireline telephone, cable modem and wireless).

increase, with subsequent increases, and a longer transition than that proposed by the Commission to provide a more meaningful price signal at the start of the transition and to allow industry participants and consumers time to plan. In addition, the impairment analysis recognizes that intermodal competition is still emerging and a longer transition may be required to allow the market to mature.

NYDPS is in accord with the Commission's transport route-by-route approach adopted in the Triennial Review Order (TRO)[6]. NYDPS constructed a model to analyze transport data under a variety of conditions to satisfy the *USTA II* Court. Despite these efforts, our analysis has not identified conditions (e.g., population density, mix of business and residential, numbers of lines) on the triggered routes that accurately predict potential competition along adjacent routes. Based on this empirical evidence, the Commission's route-by-route analysis is indeed reasonable.

Finally, pursuant to the TRO, NYDPS collected data for determining whether the impairment triggers[7] were met for switching and dedicated transport.[8] The result of including the small business market (18 lines or less) in the definition of mass market is that 162 of 520 Verizon New York Wire Centers meet the trigger test and if only residential service (4 lines or less) is considered, then 19 wire centers meet the test. In addition, NYDPS found that of 27,774 possible transport routes, 135 potentially meet the trigger test.

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[6] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*; Triennial Review Order (TRO) (released August 21, 2003), FCC 03-361.

[7] *See* 47 C.F.R. § 51.319. In general, for both local switching and dedicated transport, such services meet the trigger test, and are therefore "not impaired", where competitors have provided at least three facilities of their own.

[8] Because Verizon did not contest the Commission's national impairment finding for "high capacity loops," we did not gather any information.

I. SWITCHING

A. The Commission Should Place Substantial Weight on Intermodal Competition

The Commission seeks comments on how to create a legally sustainable impairment standard consistent with the *USTA II* decision.[9] As network technologies evolve, regulators have an obligation to routinely evaluate the dynamic and diverse nature of competitive markets and how regulatory policies are furthering or hindering economic growth and technological advances. New York has a long tradition of encouraging the growth of telecommunications competition by responding to changing conditions.[10] The Commission should take the opportunity in this rulemaking to take full account of the fact that "choice" is evolving rapidly with carriers increasingly able to use multiple platforms to satisfy consumers' telecommunications needs. While it is difficult to predict with precision just how fast consumers will move to these new platforms, there is no doubt that these platforms provide viable competitive alternatives. Thus, the Commission should recognize current market conditions by expressly placing substantial weight on intermodal competition as the basis for its switching impairment findings. Competitors with their own facilities are using VoIP, PacketCable and cellular technology to provide alternatives. In addition, new technology has provided consumers with several additional options for communication such as email and instant messaging, each of which utilizes one of three access modes and not simply traditional wireline telephony switching.

In the TRO, the Commission determined that intermodal alternatives, including wireless

[9] Section 251(d)(2)(b) requires the Commission to consider "at a minimum" whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."

[10] The Commission has recognized New York's leadership. *See, In the Matter of Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act to Provide In-Region InterLATA Service in New York*, Memorandum Opinion and Order (released December 22, 1999), FCC 99-404 . NYPSC continues to encourage the development of competition through its participation in the Industry Change Control process, and in addressing competitive concerns through a formalized Expedited Dispute Resolution (EDR) Process.

and cable, had not blossomed into full substitutes for wireline telephony.[11] It concluded that the intermodal deployment record before it did not present sufficient evidence to sustain a finding of no impairment.[12] Instead, the TRO focused on unbundled network element competition. It required the states' granular review processes to focus on relevant barriers to entry and to examine actual market entry in specific customer or geographic markets without reliance on all of the Incumbent Local Exchange Company's (ILEC) facilities or elements.[13] In *USTA II*, however, the D.C. Circuit reiterated its holding in *USTA I* that the Commission not ignore intermodal alternatives.[14]

NYDPS shares the Commission's goals of encouraging facilities-based competition and eliminating barriers to the development of a competitive local exchange market with multiple paths of entry to customers. While UNE-P competition has resulted in innovative product offerings to customers, ultimately, economic and technical advances will further new options for consumers. Competitive Local Exchange Carriers (CLECs) will need to rely on their own facilities or to enter into commercial agreements with the ILECs.[15] In particular, the Commission's presumption of impairment was based on operational and economic barriers in the ILEC hot cut process as well as other factors related to UNEs. Continuing the widespread reliance on UNE-P could serve as a disincentive to further investment in new technologies. Given the rapid change in the marketplace, in consumer expectations, and in telecommunications technology, it is important that the regulatory framework promote innovation and economic

[11] TRO at ¶ 245, 443-445.

[12] TRO at ¶ 443-445.

[13] TRO at ¶ 84, 93.

[14] *USTA II*, at 572-573 (citing *United States Telecom Ass'n. v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002) *(USTA I)*.

[15] A competitive market is, of course, subject to antitrust laws to mitigate any exercise of residual market power.

investment. Therefore, the Commission should place greater emphasis on intermodal competition to analyze impairment under 47 U.S.C. §251(d). Toward that end, New York has developed a model that meets the impairment standard and gives appropriate weight to intermodal alternatives.

B. Proposed Impairment Test

NYDPS has developed an impairment analysis that identifies competitive service alternatives in each wire center in Verizon New York's service territory. There are four basic alternatives to Verizon's traditional wired telephone service that carriers can pursue to enter the local voice market: (1) UNE-L for residential and business customers, (2) PacketCable phone service, (3) wireless service and (4) VoIP via DSL or cable modem.

The analysis considered actual deployment to date as well as service providers' announced plans for expansion. A weighting is applied to each of the available alternatives to reflect characteristics that may render them each less than perfect substitutes for traditional wireline telephone service. Thus, our analysis recognizes that consumer acceptance may lag availability. Nevertheless, we are confident that consumers will become more accepting of these alternatives as their awareness of them increases.[16] The weightings are summed for each wire center to arrive at an impairment index score. In wire centers whose indices meet or exceed an established threshold carriers are deemed not to be impaired without access to unbundled switching.

[16] Years ago customers could only connect a monopoly-provided telephone to their monopoly-provided inside wire and exchange access line, and the only long distance provider was the same monopoly provider. Today, consumers enjoy a range of choice in telecommunications devices, home and business wiring, and in both local and long-distance carriers. In light of that experience, the acceptance and adoption of these new technologies is readily predictable.

These scores, discussed in further detail below, represent NYDPS's best evaluation of the extent to which consumers would be willing and able to substitute service via a particular platform for traditional telephone service. While we understand that New York may be unique (e.g., PacketCable phone service availability may be higher in our state than in many regions of the country), we have strived to create an index that could be adjusted to the specific facts and circumstances related to the status of a state's competitive market, taking into account technology development, the mix and location of the customer base (urban/rural, residential/business), and the geographic market.[17] Based on our analysis, we find no impairment for local switching in 276 wire centers, out of 520 wire centers in New York, as shown in Appendix D, Map 1.

i. *UNE-L Availability*

UNE-L CLECs deploy their own switches. They have been establishing collocation arrangements in New York over the past eight years. There are approximately 1,200 collocation arrangements in New York including all types (e.g., cageless, physical, secured).[18] Overall, this alternative is serving about 376,820 to 384,000 [19] small business and residential customers using DS0 loops. These switches are primarily used to serve small business customers, but some progress has been made to expand the use of these switches for residential service. Twenty-two carriers are actively providing service to business and residential customers, and three of these are cable companies. Ten of these carriers, including two of the three cable companies, are

[17] For geographic boundaries, wire centers were chosen to reflect the TRO approach, but in some states other geographic boundaries, such as MSAs, may be more suitable. See attached Appendices A, C, D.

[18] *Analysis of Local Exchange Service Competition in New York State*, 2002 Competitive Analysis Report, p. 25.

[19] Based on Responses to NYDPS Staff data queries in Case 03-C-0821, *Implementation of the FCC's Triennial UNE Review Decision*.

providing service to residential customers via their own switches in approximately 178 Verizon wire centers. [20]

Before a CLEC can use its own switch to serve a residential or small business customer the ILEC must perform a manual disconnection of the customer's loop from the incumbent switch and a reconnection of the loop to the CLEC's switch (a hot cut). In the past, the Commission determined that the hot cut processes posed substantial operational and economic barriers to serve mass market customers[21] and asked state commissions to either implement a batch hot cut process (i.e., a process for transferring large volumes of mass market customers to a UNE-L CLEC), or find that the LEC's batch hot cut process does not cause impairment.[22]

In August 2004, the New York Public Service Commission (NYPSC) issued an Order addressing the hot cut rates and the bulk hot cuts process.[23] NYPSC found that Verizon's processes are sufficiently scalable to address the increased demand in a post UNE-P environment.[24] Therefore, concerns about hot cuts have largely been addressed in New York, making UNE-L a real substitute going forward.[25] Moreover, where switching has already been deployed in a specific wire center for the small business market, it is reasonable to assume those facilities could also be used to serve residential customers, especially those residential customers

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[20] *Id.* (Nineteen of these wire centers have three or more UNE-L CLECs providing service to residential customers.)

[21] TRO at ¶ 422.

[22] TRO at ¶ 423. *See, USTA II*, at 569-570.

[23] Case 02-C-1425, *Proceeding on Motion of the Commission to Examine the Process and Related Costs of Performing Loop Migrations on a More Streamlined (e.g., Bulk) Basis*, NYPSC Order Setting Permanent Hot Cut Rates (issued August 25, 2004).

[24] *Id.* at 59-60.

[25] The NYPSC has resolved many of the contentious issues related to hot cuts. For example, recently the NYPSC approved the terms of a settlement that addressed the costs of direct current power and other operational issues. *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations Relating to the Provisioning of Direct Current Power by Verizon New York Inc. for Use in Connection with Collocation Spaces*, Order Adopting the Terms of a Joint Proposal, NYPSC Case No. 03-C-0980 (issued and effective April 14, 2004).

who are already being served by the carrier via UNE-P. For a wire center where a UNE-L CLEC serves residential customers we assigned a score of 1.0. For a wire center where a UNE-L CLEC serves only business customers (18 lines or less)[26] we assigned a score of 0.5 to recognize that there are additional business and economic issues for the CLECs to consider, including development of marketing plans and customer service functions.

ii. *PacketCable Availability*

PacketCable phone service, with a cable company's managed network, is able to provide an option that is potentially[27] or fully equivalent to that of the wireline providers in terms of service, including E-911. In Verizon's New York service territory, PacketCable service is widely available from Time Warner and Cablevision.[28] Infrastructure is more or less ubiquitous. The score of 1.0 assigned to this alternative reflects that this service is ubiquitously available in Cablevision's territory and that Time Warner has formally announced plans to roll it out more expansively over the next six months.[29] This score also recognizes that Time Warner does not require cable service as a prerequisite for phone service, so there are no major additional costs for the majority of consumers. Since nearly 80% of New Yorkers will have cable phone service available to them by year end,[30] we see no limitation on residential consumers switching to this alternative platform provider.

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[26] This data represents the number of CLECs serving small businesses and residential customers having 18 lines or less. See the Commission's definition of mass market as it appears in the TRO at ¶127. See also, attached Appendix A Intermodal Impairment Test Data Inputs.

[27] The extent to which a cable provider markets and structures its product as a substitute for voice is largely within the discretion of the cable provider and not, per se, limited by available technology.

[28] www.cablevision.com.

[29] *Time Warner Cable Creates Unit to Handle Residential Telephone Business*, Time Warner Website, January 22, 2004. Time Warner Cable states that it has already announced plans to roll out digital phone service in most, if not all, of its 31 operating divisions by year end.

[30] Time Warner serves 50% of the State and Cablevision serves over 30% of the state. Charter, which serves less than 2% of the state, has also announced plans to have cable phone service available in 2005.

iii. *VoIP Availability*

VoIP services obtained over the customer's internet connection using the cable and telephone companies' broadband platforms (cable modem and DSL) have become widely available in New York where companies such as Vonage and AT&T are actively marketing these services.[31] Currently, cable modem subscribers can choose a range of VoIP providers. An index score of .75 was assigned based on our recognition that service providers may use the public Internet and may not always offer the same level of service quality for voice traffic as do PacketCable providers. Moreover, such non-network based VoIP providers are currently unable to offer E-911 services equivalent to PacketCable and landline providers. The score also recognizes that customers must subscribe to a broadband service to avail themselves of this service.[32] Although 95% of New Yorkers have access to broadband capability,[33] the added cost, as well as the factors described above, lead us to conclude that VoIP service is not an equal substitute for landline service at this time.

iv. *Wireless Availability*

Wireless services are offered to the public using a variety of technologies and Commission allocated spectrum (e.g., cellular). We assigned the wireless platform a weighted score of 0.5 if there were at least two wireless providers serving the wire center.[34] Wireless services are almost ubiquitously available in New York and exhibit very high subscription rates.

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[31] Statement of Chairman Michael K. Powell. *In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313; *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, www.vonage.com.

[32] This score assumes that Verizon will make stand-alone DSL available.

[33] *Study of Rural Customer Access to Advanced Telecommunication Services*, NYDPS Report (released February 1, 2003) (Report to New York State Legislature on overview of access to advanced telecommunications services by rural customers).

[34] As Verizon Wireless is a primary provider of wireless services in New York, requiring the presence of at least two wireless providers in a wire center ensures the presence of at least one non-affiliated wireless network.

Growing evidence that some consumers, especially younger consumers, are willing to replace traditional wireline voice service with only wireless service, coupled with ongoing efforts by the wireless industry to respond to consumer demands for improved quality and service of wireless service,[35] and recent availability of wireline-wireless number portability[36] indicates that wireless is becoming a substitute in some circumstances. Characteristics of radio technology, including dropped calls, uneven reception, and the lack of a dependable E-911 capability, suggest wireless is not yet a full substitute for basic wired telephone service. Therefore, we assigned wireless a 0.5 score.

v. *Index Analysis*

The index developed by NYSDPS may be employed to determine whether sufficient alternatives are available in a wire center to support a finding of no impairment. If competition were available from all the sources described above in a given wire center, an index value of 3.25 would be determined for that wire center. In our judgment, an index value of 2.75 or above indicates a level of competition sufficient to conclude that carriers will not be impaired without access to unbundled switching under the Act. Additionally, there should be at least three alternatives to the ILECs wireline service and at least three different platforms to protect against market concentration. Given that the maximum index value is 3.25, and recognizing that the presence of each alternative is not necessary to conclude that switching be provided on a non-TELRIC basis, NYDPS believes an index value of 2.75 reflects a suitably robust mixture of alternatives to serve as an index trigger value. This value might be reached, for example by the

[35] According to estimates from the Commission, as many as 68% of United States residents who are between the ages of 18 and 24 own a cell phone. Among that demographic, 15% do not have a landline at home. http://www.fcc.gov.

[36] *In the Matter of Telephone Number Portability, CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues;* Memorandum Opinion and Order and Further Notice of Proposed Rulemaking (Released November 10, 2003) FCC 03-284.

presence of UNE-L for residential customers, PacketCable, wireless, and DSL-based VoIP (3.25), or UNE-L for business customers, PacketCable, wireless, and cable modem supporting VoIP (2.75).

While NYDPS's specific index analysis may not be definitive for the nation, we recommend it as a framework that can be utilized across the country. Markets will and do evolve differently throughout the country. It is fair to say that in New York, at least in some areas, the market penetration of competitors is higher than in many other areas of the country.[37] For example, PacketCable service, widely available in New York, may not be a major force in other parts of the country. Thus, a one size fits all approach may not be appropriate. Consequently, the Commission may need to adapt this model to account for regional differences.

C. NYDPS Transition Approach

Under the Commission's Order, UNE-P will continue to be available at existing prices for six months from publication in the *Federal Register* or until March 12, 2005, unless current rates are changed via (1) voluntarily negotiated agreements; (2) a Commission Order; or (3) rates being increased by the state. The Commission's interim rules establish that at the end of this first six month period, if there is a finding of no impairment or no action by the Commission, UNE-P will continue to be available for another six months with a one dollar price increase. NYDPS supports both a price increase and a transition period. However, the increase in price should be greater than one dollar and the transition period should continue for an additional six months (i.e., eighteen months from the date of publication in the *Federal Register*).

A larger initial price increase would provide a more meaningful price signal to carriers in the market and encourage prompt implementation of migration plans. The longer transition takes

[37] *See*, fn 32 *Supra*.

into account that competition is still developing. A longer transition would make the Commission's reliance on intermodal competition more reasonable and would allow for alternative technologies to become even more prevalent in the marketplace. It would also allow more time for carriers and consumers to adapt to the new circumstances.[38]

Moreover, NYDPS urges that prices should increase more rapidly during the transition so that the final price at the end of the transition would be no less than the price of an equivalent retail product offered for resale or a lower, market-determined price. In effect, the final price ceiling should reflect Verizon's retail price minus the costs of activities no longer performed by Verizon when selling at wholesale.[39] Under our approach the TELRIC rate on March 13, 2005 would be increased 25% of the difference between the anticipated final price and the current price, then another 25% on September 13, 2005 and then the remainder on March 13, 2006.[40]

II. TRANSPORT

A. The Commission's TRO Dedicated Transport Analysis Is Reasonable and Should be Retained

In the NPRM, the Commission seeks comment on how it should implement transport unbundling rules in a manner more consistent with the D.C. Circuit's *USTA II*[41] decision. More specifically, the Commission seeks comment, including evidence at a granular level, on how to determine whether a competitor has access to dedicated transport.

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[38] We recognize that not every consumer currently has a choice, or for that matter, will have choice in the future, though the vast majority of New Yorkers will have access to multiple forms of telecommunications. Action should be taken, where appropriate, to protect consumers who may be left behind by the marketplace.

[39] *See* NYPSC Case No. 04-C-0429, *In the Matter of Telecommunications Competition in New York*. Estimated by Verizon to average approximately $35.05.

[40] This proposal is not intended to affect pre-existing ILEC obligations to a state.

[41] *United States Telcom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), *pets. for cert. filed*, Nos. 04-12, 04-15, 04-18 (June 30, 2004). In general, under the TRO a route was not impaired if such route contained either three or more "self-provisioners" or two or more wholesale providers.

The D.C. Circuit questioned the Commission's route-by-route analysis observing that, although it might be "infeasible" to define the transport market in a broader manner, the Commission failed to demonstrate that it explored alternative definitions or methodologies.[42] The Court was concerned that the Commission's route-by-route analysis was performed in a vacuum, ignoring facilities deployment on one route when examining other adjacent routes.[43] In other words, the Commission failed to demonstrate why the existence of "self-provisioners" along one transport route (e.g., Wire Center A to Wire Center B) was irrelevant to the possibility of competition on an adjacent route (e.g., Wire Center A to Wire Center C).[44]

In response to the Court's concerns, NYDPS developed a statistical model that analyzed the conditions on TRO triggered transport routes to determine if those conditions could be used to predict competition on adjacent routes. In practical application, however, the conditions found on routes triggered did not correlate with the existence of competition on those routes. Thus, NYDPS model confirms that the Commission's route-specific approach is a reasonable analytical tool for determining impairment.

More specifically, NYDPS determined that 15,774 intraLATA routes are candidates for dedicated transport in Verizon's New York territory.[45] Next, NYDPS found that 135 Verizon routes contained three or more transport competitors of any capacity type. NYDPS developed a statistical model that analyzed the following characteristics of each specific triggered route: (1) whether a competitor used its own switches specifically for providing UNE-L to small business

[42] *USTA II* at 575.

[43] *Id.*

[44] *Id.*

[45] NYDPS calculated the routes by counting the number of wire centers in Verizon's territory and determining how many routes would exist if every single wire center connected to every other wire center on an intralata basis. Then NYDPS reduced the number by considering only those routes as candidates where a competitor has customers, evidenced by collocation of switches in a Verizon wire center.

customers; (2) whether UNE-L is used to provide service to residential customers; (3) the total number of customers served by all providers in the wire centers; (4) the square mileage of the area served by each wire center;[46] (5) the proportion of residential to business customers; and (6) the average household earnings of customers served by each wire center.[47]

NYDPS found that the model could not predict competition even along the routes having three or more transport competitors.[48] The model predicted competitive routes with only 67% accuracy given the variables used. Moreover, the model found only an additional 46 routes "likely competitive" when it was applied to the adjacent routes in Verizon's New York territory. In addition, we do not have information available for those 46 routes identifying other factors that could account for the lack of deployment of competitive facilities, such as whether a CLEC could gain access to rights-of-way along the route or has collocation available.

Accordingly, NYDPS concludes that the statistical error rate of 33% renders the use of the model unworkable for this purpose. Additionally, of the 15,774 candidate routes for transport in Verizon's New York territory, only 135 have three or more transport competitors. Any adjacent routes found to be "competitive" under the statistical model represent such a small proportion of all routes (46 of 15,774) as to be insignificant.[49]

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[46] "Square miles served" was used to provide an identifiable variable for comparing rural and urban areas.

[47] "Net Household income" was used to determine if there was any difference between competitive transport offerings among urban, suburban and rural areas, as defined by this measure of income.

[48] NYDPS statistical model employed a logit regression analysis which creates a binary outcome, in this case competitive ("1") or not competitive ("0"). Relevant factors are taken from the set of those triggered routes known to be competitive (to create a dependant variable) and measured against the set of those routes in question (not triggered) to determine with what probability those routes may be categorized as "1" route (known competitive routes) or as a 0 (presumed to be not competitive). Each model was able to predict some non-triggered routes as "likely competitive," however, neither model was able to predict already competitive routes with any reasonable degree of accuracy. Thus, NYDPS viewed as highly suspect any results for non-triggered routes. See Appendix B.

[49] Appendix D, Maps 2 and 3.

Having made reasonable efforts to develop a statistical model, we conclude that the conditions on the routes that were triggered could not predict competition on the adjacent routes with sufficient accuracy. Therefore, NYDPS recommends that the Commission retain its route-by-route analysis.[50]

III. NYDPS' DATA COLLECTION

Pursuant to the TRO's delegation to the states for determining whether the triggers were met for finding non-impairment, NYDPS commenced a proceeding to collect data necessary to an evaluation of the triggers.[51] NYDPS compiled the data, distributed a summary to the parties, and on December 2, 2003, NYDPS held a technical conference. NYDPS then asked for additional information regarding the TRO triggers.[52]

The data was not subject to formal cross examination, but was attested to and was commented on by parties. Appendix C hereto more specifically summarizes the data in aggregate form as it was made public in a NYDPS memorandum, dated March 31, 2004.

A. Switching Data Collection

Under 47 C.F.R. 51.319, local circuit switching is not impaired where the State Commission finds three or more competitors self-provisioning in a wire center. The State Commission is to consider intermodal competitors to the extent that they offer service comparable to that of the ILEC.

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[50] Contrary to switching, NYDPS believes that the Commission's proposed transition period and price is appropriate for unimpaired transport routes.

[51] *In the matter of the Implementation of the Federal Communications Commission's Triennial UNE Review Decision*, NYPSC Case 03-C-0821.

[52] After the technical conference, NYDPS sent out further data requests to CLECs on December 13, 2003, and to incumbent LECs on December 22, 2003. Then NYDPS sent out request specifically tailored to transport on December 13, 2003. For all the foregoing, NYDPS set a response date of January 9, 2004.

In performing its initial analysis for local circuit switching, NYDPS conducted a wire center-specific review that omitted wireless and data switches deeming them as competitors not offering service comparable to Verizon.[53] We agree with the TRO finding, that a competitor serving only a few UNE-L lines should not be considered as "actively providing" service for the switching trigger.[54]

Notably, the TRO did not define the mass market, instead deferring the definition of the market to the State Commissions.[55] Accordingly, NYDPS determined that when small business (18 lines or less) was included in the mass market,[56] 162 Verizon wire centers were triggered. If, however, the mass market were interpreted to include only carriers offering service to residential customers[57] (four lines or less), then 19 Verizon wire centers were triggered.

B. Transport Data Collection

Pursuant to the Commission's regulations for dedicated transport, a route is considered competitive, in general if it includes either two or more wholesale providers or three or more self-provisioning competitors.

In performing its impairment analysis, NYDPS assumed that the two end points of a candidate route were connected along the entire route unless the competitive LECs provided that the route should not be counted because it terminated in a CLEC switch or passed through a CLEC's facilities at some point along the route. NYDPS did not assume, however, that a route

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[53] As seen in the section regarding switching, *supra*, NYDPS's view on intermodal alternatives, such as wireless, has evolved along with the evolution of those services.

[54] A switch was considered "actively providing" service where it provides service to mass market customers, and where it is "operationally ready and willing to provide service to all customers in the designated market." TRO at ¶ 499.

[55] TRO at ¶ 499, *see* 47 CFR 51.319(d)(2)(i).

[56] TRO at ¶ 127.

[57] TRO at ¶ 127, n.432.

meeting a DS3 trigger necessarily also triggered DS1 dedicated transport based on the Commission's regulations separating the two capacities. [58]

Based upon these assumptions, NYDPS found that 72 routes in Verizon's New York service territory were triggered. NYDPS found an additional 63 routes that included three or more self-provisioned transport facilities but did not determine those routes to be triggered because CLECs did not provide information as to the capacity available on those facilities. Based on the Commission's statement that competitors generally cannot self-provide DS1 transport,[59] NYDPS now believes its reasonable to assume that the 63 routes where there are three or more self-provisioners use DS3 transport facilities. Therefore, NYDPS has found that 135 routes may be triggered in Verizon's New York service territory.

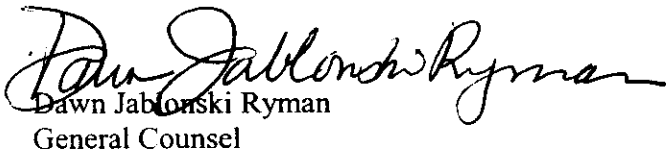
[58] 47 CFR 51.319(e). DS1 transport provides a total digital signal speed of 1.544 megabytes per second. *Id.* DS3 transport provides for a total digital signal speed of 44.736 megabytes per seconds. *Id.*

[59] TRO at ¶ 391.

CONCLUSION

For all of the foregoing reasons, NYDPS urges the Commission to rely on both intramodal and intermodal competition to determine impairment, and to lengthen the transition period and prices. Finally, the Commission's TRO transport trigger approach continues to be reasonable, based on our analysis.

Respectfully submitted,



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Dated: October 4, 2004

APPENDIX A
IMPAIRMENT TEST

In response to the Commission's August 20, 2004 NPRM, NYDPS used data initially collected for its TRO proceeding to create an impairment test.[60] In addition to the TRO data, NYDPS also used data collected from various resources, including the Commission, regarding the availability of intermodal alternatives to traditional "plain old telephone service" in New York State. For our impairment test, NYDPS created an index to represent the relative substitutability of various competitive intermodal alternatives. For example, data was collected regarding the availability for each wire center in Verizon's New York territory of UNE-L service; broadband access (for VoIP services); PacketCable phone service; and wireless service. The following sections discuss more fully how the collected data was used in our impairment test.

I. DATA INPUTS

A. UNE-L Availability

Pursuant to its TRO proceeding, NYDPS had collected data regarding whether CLECs were "actively providing" service using UNE-L for the area served by each wire center. NYDPS identified competitive carriers that used their own switches to provide voice service.[61] Accordingly, the original data included switches serving very few UNE-L lines. Because the TRO did not define switches serving so few lines as "actively providing" service,[62] those switches were not considered in this impairment test. Additionally, switches for which parties did not provide information on the number of lines served were not considered in this test.

The Commission left it up to the states to define the mass market. Accordingly, NYDPS performed two analyses for competitors using their own switches. The first analysis included CLECs serving small business and residence customers with 18 lines or less, and the second analysis included only residential customers.[63]

Verizon provides local service in at least 520 wire centers in New York. In 329 of those 520 wire centers, one or more CLECs are using their own switches to actively provide service to customers having 18 lines or less. Moreover, one or more CLECs are using their own switches to actively provide service to residential customers in 178 wire centers.

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[60] See NYDPS Comments, Section I, Switching, herein for a discussion regarding the test and results.

[61] TRO at ¶499.

[62] See the Commission's explanation of "actively providing" service in the TRO at ¶499.

[63] Compare the Commission's discussion of the mass market as it appears in the TRO at ¶127 with that at footnote 432.

B. Broadband Availability

For our impairment test, NYDPS considered the availability of internet service provided either by digital subscriber line (DSL) or by cable modem.

NYDPS obtained information regarding the availability of DSL for each of Verizon's wire centers by using data from the Commission's June 2003 report titled "Local Competition and Broad Band Reporting." The data reported the zip codes in which each DSL provider serves end-user locations.[64]

NYDPS determined DSL availability by looking for those zip codes served either by Verizon or Covad. The zip codes were then assigned to wire centers. If a zip code's area straddled two or more wire centers, the zip code was assigned to the wire center in which it had the larger area. NYDPS found that broadband internet access via DSL is available in areas served by 487 of the 520 Verizon New York wire centers.

Similarly, NYDPS determined cable modem availability by using data from the same proceeding. As of June 2003, at least eight cable companies were doing business in Verizon's New York territory.[65] NYDPS found that broadband internet access via cable modem is available in 490 of 520 Verizon New York wire centers.

C. PacketCable Availability

Of the five major cable companies operating within New York State, only the two largest, Time Warner and Cablevision, currently offer their own PacketCable phone service.[66] According to its tariff on file with NYDPS, Time Warner offers the service in approximately 50% of the New York market, while Cablevision serves approximately 30 % of such market. PacketCable phone service by Time Warner and Cablevision is available in 432 of the 520 Verizon wire centers.

D. Wireless Availability

Cellular coverage was determined by inputting a representative zip code for each county into the "WirelessAdvisor.com" website.[67] As with the foregoing providers, zip

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[64] The zip code information was taken from the results of companies' self-reporting on Commission Form 477, Part V-1.

[65] As with DSL availability, the information used to determine cable modem availability was taken from the results of the Commission's Form 477 in the "Local Competition and Broad Band Reporting" proceeding.

[66] Three other cable companies, Adelphia, Charter and Mid Hudson, do not yet offer PacketCable phone service, although their networks are technically capable of providing such a product.

[67] WirelessAdvisor.com is available at the following web address: http://www.wirelessadvisor.com/. NYDPS performed its queries on WirelessAdvisor.com on September 2, 2004, and September 3, 2004, between 9 a.m. and 5 p.m. E.D.T. WirelessAdvisor.com is suggested by the Commission's own website as a source to determine the availability of cellular coverage.

See http://wireless.fcc.gov/services/broadbandpcs/operations/findingserviceprovider.html.